CHAN HO-KUEN & ANOR.

v.

THE QUEEN

COURT OF APPEAL, HONG KONG
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
[PRIVY COUNCIL APPEAL NO. 10 OF 1990]
23 MAY 1990

CRIMINAL PROCEDURE: *Drug trafficking - Ingredients of the offence - Whether directions of the trial Judge wrong - Effect of presumption - Appeal against conviction and sentence - Sentencing power of Court re-trying the offence - Dangerous Drugs Ordinance (Cap 134) ss. 46, 47 - Criminal Appeal Act 1968.*

This is an appeal from the judgment of the Court of Appeal of Hong Kong, dismissing the appellants' appeal against conviction and sentence in respect of dangerous drugs charges in a re-trial before the High Court of Hong Kong. Two questions are raised in this appeal, namely:

(a) whether the directions given by the trial Judge in his summing up were confusing, prejudicial and wrong in law, thereby rendering the conviction unsafe and unsatisfactory;

(b) whether it was wrong in principle to increase the sentences passed at the first trial unless there was new evidence indicating that the sentences at the first trial were manifestly inadequate.

The appellants were essentially charged with two counts of illegal possession of dangerous drugs. The first appellant was driving, whilst the second appellant and another person, Ko, were in the rear compartment of the van, when they were stopped by the police. The drugs were found in the van. The appellants both denied any knowledge of the nature of the drugs in the containers in the van. They maintained that they were hired by Ko to convey "parallel" goods, i.e. silver, gold coins and gold bars that had been smuggled into Hong Kong. The first appellant said that he had hired the van on Ko's instructions.

Subsequently other drugs were found on premises for which the keys were found in the second appellant's possession. He denied knowledge of these drugs as well. By virtue of ss. 46 and 47 of the Dangerous Drugs Ordinance (Cap. 134), the appellants were presumed, until the contrary was proved, that the drugs were in their possession, that they knew of their nature and that they had them for the purposes of trafficking.

In his summing up to the jury the trial Judge said that there were four ingredients in the offences which had to be proved, namely that the substance in issue were the drugs charged, that each appellant was in possession of the drug (in the sense that he was in control of it), that each knew that the substance was a dangerous drug and that the purpose of possession was for trafficking. The trial Judge then explained the effect of the legal presumptions on these four ingredients. After that, however, instead of following the time-honoured approach of explaining to the jury that the presumptions applied only until "the contrary is proved",

the trial Judge decided to adopt what has been referred to as the "new route". The appellants contended that it was this portion of the trial Judge's summing up that was confusing, prejudicial and wrong.

Held:

[1] Although it was lacking in simplicity and clarity, there was no error of law in the direction given by the trial Judge.

[2] The trial Judge in a re-trial is in no way fettered by the sentence imposed at the first trial; there is no statute in Hong Kong equivalent to the English Criminal Appeal Act 1968 which prevents a Court re-trying the offence from passing a sentence heavier than that passed on the original conviction.

[Appeal dismissed.]

Cases referred to:

R. v. Carr-Briant [1943] 1 KB 607
Kwan Ping Bong v. The Queen [1979] 2 WLR 433
Garrett [1978] 18 SASR 308

Legislation referred to:

Dangerous Drugs Ordinance (Cap 134) [HK], ss. 46, 47
Criminal Appeal Act 1968 [UK], Sch. 2 para. 2(1)

Other source referred to:

Phipson on Evidence, 13th Edn., para. 41-03

JUDGMENT

Lord Ackner:

This is an appeal by special leave from a judgment of the Court of Appeal of Hong Kong (Fuad V.-P., Clough and Hunter JJ.A.) dated 7 April 1988, dismissing the appellants' appeals against conviction and sentence in respect of dangerous drugs charges in a re-trial before the High Court of Hong Kong (O'Connor J and a jury) on 12 October 1987. The first appellant was convicted of possessing dangerous drugs for the purposes of trafficking and was sentenced to 17 years' imprisonment and the second appellant was convicted of 2 charges of the same offence and was sentenced to 20 years' and 16 years' imprisonment concurrently. The appellants had been previously convicted on these charges, but those convictions were quashed on appeal by the Court of Appeal on 10 April 1987 and a re-trial had been ordered.

Two questions essentially are raised by this appeal namely:

(1) Were the directions given by the learned trial Judge in his summing-up as to the meaning and effect of the presumptions under the Dangerous Drugs Ordinance (Cap. 134) confusing, prejudicial and wrong in law thereby rendering the convictions unsafe and unsatisfactory?

(2) Whether it was wrong in principle to increase the sentences passed at the first trial in respect of the same counts unless there was new evidence indicating a greater degree of complicity or that the sentences at the first trial were manifestly inadequate.

The Indictment

There were two counts before the jury. The first count charged both appellants with possessing dangerous drugs for the purposes of unlawful trafficking. The particulars of that count were that on 17 July 1984 in Tai Po Road, Shatin the appellants were in possession of

181.273 kilogrammes of a mixture containing no less than 157.973 kilogrammes of esters of morphine for the purpose of unlawful trafficking. The second count charged the second appellant with a like offence, the particulars of which asserted that on the same day at Chap Wai Kon Village he had in his possession 46.668 kilogrammes of a mixture containing 43.459 of salts of esters of morphine.

The Facts

These were very simple. In the early hours of 17 July 1984 both appellants, in different vehicles, went to a pier at Tai Po. The first appellant was driving a vehicle which he had hired three days earlier. At the pier, the drugs, which were the subject matter of the first count were unloaded from a boat on to the van driven by the first appellant. The second appellant, together with a man named Ko Yee-shui, entered the rear compartment of the van where the drugs had been placed. The first appellant then drove the van away, but it was stopped by the police who found the second appellant and Ko packaging or securing the cartons of drugs.

The appellants both denied knowledge of the nature of the drugs in the containers in the van. Their defence was that they were recruited by Ko to convey "parallel" goods i.e., silver or gold coins and gold bars that had been smuggled into Hong Kong and that they thought the cartons contained such goods. The first appellant alleged that he had hired the van on the instructions of Ko.

Following his arrest, the second appellant was asked if he lived in an address in Chap Wai Kon Estate. He said he did. Keys were found upon him which gave access to a flat at that address and inside that flat, in a locked room, further dangerous drugs, the subject matter of the second count, were found. The second appellant did not have the key to the locked room on his person, but it was found some days later under the refrigerator inside the flat. The second appellant said that he had entered the flat two months earlier and had lived there intermittently with his girlfriend. He had rented the locked room to a man introduced to him by Ko. He knew nothing of the drugs found in this room.

The Presumptions under the Dangerous Drugs Ordinance (Cap. 134)

By s. 46 of the Ordinance it is provided that:

> Any person who is proved or presumed to have had in his possession more than:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) one half gram of any of the following substances, either alone or contained in a preparation, mixture, extract or other material:
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) an ester of morphine
>
> (v) a salt of an ester of morphine;
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> shall, until the contrary is proved, be presumed to have had such dangerous drug in his possession for the purposes of trafficking therein.

By s. 47 of the Ordinance it is provided that:

> (1) Any person who is proved to have had in his possession or custody or under his control:
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> (a) anything whatsoever containing a dangerous drug;
>
> (b) the keys of anything whatsoever containing a dangerous drug;
>
> (c) any place or premises or that part of any place or premises in which a dangerous drug is found;
>
> (d) the keys of any place or premises or part of any place or premises in which a dangerous drug is found;
>
> shall, until the contrary is proved, be presumed to have had such drug in his possession.
>
> (3) Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.

The Summing-up

The learned Judge, in his summing-up, correctly directed the jury that there were four ingredients in the offences which had to be proved, namely:

(1) That the substance in issue were the drugs charged;

(2) That each appellant was in possession of the drug, in the sense that he was in control of it;

(3) That each appellant knew that the substance was a dangerous drug; and

(4) That the purpose of possession was for trafficking.

The learned Judge then directed the jury in the following terms:

> The law has laid down certain particular presumptions in respect of these sorts of charges, and these presumptions are to the effect that if certain facts are proven then other presumptions are [sic] inferences that assist the Crown, arise from those facts. These presumptions are really inferences which the law says arise on proof of certain facts. When I tell you about them, you'll probably think they are very sensible.

The Judge then dealt with each of the four ingredients in relation to the first appellant on the first count, referring, where appropriate, to the statutory presumptions. Having told the jury that in relation to the first ingredient there was no dispute that the substance in issue was the drug charged, he then continued as follows:

> The second ingredient to be proven is that the 1st defendant possessed the drug charged in the sense of having control of it. When you are considering that, of course I observe in passing that more than one person can be in possession of an article at the same time - there can be possession in more than one person at the same time.
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> Now in respect of this ingredient, that is, that he was in possession of it, a presumption arises for consideration and that presumption is as follows:
>
> If you find it proven beyond reasonable doubt that the 1st defendant was in control of the van then it is presumed, that is it is inferred, that he was in possession in the sense of having control of the drugs also. So, if it is proven that he was in control of the van, then it is presumed that he was also in control of the drugs in it. I expect that you would have no difficulty in finding that he was in control of the van because he was the hirer of it and was driving it. So, if you find that he was in control of the van, then you presume that he was also in possession and control of the drugs - I'll later be telling you how presumptions might be upset, but first I am telling you what the presumptions are.

> The third ingredient in respect of the 1st defendant on the first charge is that it has to be proven that he knew the substance was a dangerous drug. In respect of this matter another presumption arises.
>
> If you find it proven beyond reasonable doubt that the defendant was in possession in the sense of control of the dangerous drug, and the presumption could prove that beyond reasonable doubt (presumptions I have already told you about), and if you find that proven that he was in possession in the sense of control of the drug, then a further presumption arises and that presumption is that he knew it was such a drug.
>
> So one presumption as it were springs from another. If it is proven beyond reasonable doubt he is in control of the van, then the presumption arises that he was also in possession of the drug; and if it is proven that he was in possession of the drug, another presumption arises - that he knew it was such a drug.

As to the fourth ingredient he had already told the jury that this was not in dispute because of the presumption that any person in charge of drugs of the quantities charged had them for the purpose of trafficking.

So far so good. The matter had been put before the jury clearly and simply.

As regards the second appellant, in relation to the first count a more favourable direction than that to which he was entitled was given, the Judge saying that, so far as he was concerned, there was no particular presumption except that in relation to trafficking. As to the second count which affected only the second appellant, he gave similar directions, *mutatis mutandis*, to those which he had given in relation to the first appellant on the first count.

The next step in his directions on the law was to explain to the jury that these presumptions only applied until, in the words of the Ordinance, "the contrary is proved". On the facts of this case all that this necessitated was to tell the jury:

(i) that it was the obligation of the accused to prove the contrary,

(ii) that whereas the prosecution had to prove their case beyond reasonable doubt, the accused only had to prove that their explanation as to how they came to be in possession of the drugs was more likely to be true than not and

(iii) that if the jury were so satisfied, then the presumption that the appellants knew the nature of the drugs found in their possession would not apply.

To have so directed the jury would have been to follow in substance the time honoured approach laid down by the Court of Appeal Criminal Division in *R. v. Carr-Briant* [1943] 1 KB 607 where at p. 612 Humphreys J said:

> ...in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

Instead of so doing, the Judge decided to adopt what has been referred to as a "new route" and one which he has followed in at least one other subsequent case. He said this:

> Now members of the jury, I have told you about presumptions that would arise on the evidence. If they arise, then you have to consider whether they still remain in the light of all the evidence because the law - when providing for these presumptions the law also very sensibly provided for the possibility that on the facts of a particular case the presumptions

might be wrong and might work an injustice. So the law has provided, as it were, a let-out in the case where particular presumptions arise; and in respect of each and every presumption that I have spoken to you about, this let-out would arise for consideration. The let-out is this.

The let-out is to the effect that if in the light of all the evidence in the case you conclude that more probably than not the particular presumption would be wrong, then that presumption falls away and you would not rely upon it in arriving at your verdict. Note: in order for the presumption to fall away it is not sufficient for you to conclude that the presumption is as likely to be wrong as to be right. If you merely come to the conclusion that in the light of all the evidence a particular presumption is likely to be wrong as to be right, the presumption does not fall away. In order for it to fall away, it has to appear to be more probably wrong than right.

It is this part of the summing-up which Mr. Martin Thomas QC for the appellants criticises as confusing, prejudicial and wrong. He makes the following points:

(1) It is incorrect and misleading to refer to a presumption as being "wrong". He quoted from the 13th Edn. of *Phipson on Evidence* paras. 41-03: "Presumptions are devices whereby the Courts are entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence about it". Such a device cannot be "wrong", it is merely inapplicable. Duckett QC, for the Crown most helpfully, drew their Lordships' attention to the observation of Lord Diplock in *Kwan Ping Pong v. The Queen* [1979] 2 WLR 433 at 438 where, in giving the judgment of the Privy Council, he said:

> Where, as is not uncommon in modern legislation dealing with drugs and other dangerous objects or materials, there is provision that on proof by the prosecution of the existence of certain facts some other fact shall be presumed to exist unless the contrary is proved (in the instant case guilty knowledge on the part of the accused), the effect of the provision is to convert an inference which at common law the jury would not be entitled to draw unless they were satisfied beyond all reasonable doubt that it was right, into an inference which they are bound to draw unless they are satisfied that on the balance of probabilities it is wrong. So they must draw it even though they think that it is equally likely to be right as to be wrong.

As has been quoted above, the Judge had told the jury that "These presumptions are really inferences which the law says arise on proof of certain facts". Their Lordships are quite satisfied that the Judge in his directions was explaining to the jury that on the facts of a particular case the inference which the law says arises on the proof of certain facts, is capable of being shown by subsequent evidence to be wrong. There is thus no substance in this criticism.

(2) The word "let-out" is potentially pejorative and thus potentially prejudicial. It is capable of giving the impression that, notwithstanding that the law provides for an inference which the jury are bound to draw, nevertheless the accused can "get away with it" if something unspecified happens. Their Lordships, while firmly of the opinion that the word "let-out" is an imprecise and unsatisfactory expression and one which should not be used, are not satisfied that it carries with it the implication suggested by Mr. Thomas.

(3) To say that the "presumption falls away" creates the impression that the presumption is itself evidence. Moreover it fails to give the jury the appropriate assistance as to what is the consequence if the presumption "falls away".

While their Lordships take a similar view in regard to the phrase "falls away" as they do in relation to "let-out", namely that it lacks the necessary precision and clarity, they are not satisfied that it suffers from the vice attributed to it by the appellants.

Accordingly in the judgment of their Lordships there was no error of law in the direction given by the Judge. Nevertheless with every respect to the Court of Appeal, their Lordships cannot agree that the "new route" provides "a very sensible and acceptable direction which avoids some of the complications of the other approach". In particular their Lordships cannot agree that "it avoids some of the legalese which is implicit in the other approach and is more likely to be understood by a jury". For the reasons which have been set out above, their Lordship do not accept that there are any particular complications in the conventional direction or that it necessarily involves legalese which the jury would have any difficulty in understanding. Their Lordships consider that, although the direction complained of contained no errors of law, it lacked both simplicity and clarity. It should not be resorted to in future.

The Sentences

The English Criminal Appeal Act 1968, Schedule 2 para. 2(1), provides that where a person ordered to be retried is again convicted on re-trial, the Court before which he is convicted may pass in respect of the offence any sentence authorised by law, not being a sentence of greater severity than that passed on the original conviction. No such provision exists in the Hong Kong legislation. Accordingly the Judge on the re-trial is in no way fettered by the sentence imposed at the first trial. The trial Judge at the second trial must do what he himself thinks proper in all the circumstances, one of those circumstances being that he has the advantage of knowing what another Judge thought of the same or similar facts, that is to say the facts which emerged at the first trial. In the end it is he, and he alone, who is responsible for deciding what is the proper sentence (see the South Australian decision of *Garrett* [1978] 18 SASR 308 - the joint judgment of Hogarth ACJ and White AJ at p. 313).

O'Connor J considered that the sentences imposed at the first trial "were a bit below the appropriate level" (15 years in respect of the first appellant and 15 years and 13 years concurrent in respect of the second appellant). The Court of Appeal, having listened carefully to the submissions, concluded that there was no reason for interfering with the Judge's view. Their Lordships are of like opinion.

In the result their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Also found at [1990] 2 CLJ 340